United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1910.

696

No. 2107.

ELLA ANDERSON, ADMINISTRATRIX OF THE ESTATE OF CHARLES P. ANDERSON, DECEASED,

vs.

J. PAUL SMITH.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JANUARY 14, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

JANUARY TERM, 1910.

No. 2107.

ELLA ANDERSON, ADMINISTRATRIX OF THE ESTATE OF CHARLES P. ANDERSON, DECEASED, APPELLANT,

vs.

J. PAUL SMITH, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1910.

In the Court of Appeals of the District of Columbia.

No. 2107.

ELLA ANDERSON, Adm'x, &c., Appellant,
vs.
J. PAUL SMITH.

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a Supreme Court of the District of Columbia.

Law. No. 49559.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Plaintiff,
vs.
J. PAUL SMITH, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Bt it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration, &c.*

Filed June 22, 1907.

In the Supreme Court of the District of Columbia.

Law. No. 49559.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Plaintiff,
vs.
J. PAUL SMITH, Defendant.

First Count. The plaintiff, Ella Anderson, Administratrix of the estate of Charles P. Anderson, deceased, duly appointed such by the Supreme Court of the District of Columbia, holding a Special Term for Probate Court, and who now here brings her Letters of Administration in that behalf, sues J. Paul Smith, the defendant, for that on, to wit, June 29, 1906, and at the time of the grievances hereinafter men-

tioned, the said defendant was engaged in tearing down or wrecking a building situated on M Street near 34th Street, Northwest, this City and District, and while so engaged, had in his employ and at work on the tearing down of said building, one Charles P. Anderson; that it then and there became and was the duty of the said defendant to exercise reasonable care in and about the doing of said work, in order that a reasonably fit, proper and safe place might be provided for his employees in which to work, but notwithstanding his duty in this regard, he became and was negligent in that
2 he failed to provide a reasonably fit, proper and safe place for his employees to work, whereby and by reason of which said negligence, the said Charles P. Anderson, while in the employ of the said defendant, and engaged in and about the tearing down of said building as aforesaid, without fault or negligence on his part, was killed by the premature falling of a large and heavy door frame upon him; that said intestate left surviving him as his only next of kin, his widow, Ella Anderson, Administratrix, plaintiff herein; his son, Oliver Anderson, and his daughters, Cora Hundley, and Sephronia, Helen and Barbara Anderson, all of whom have suffered great damage, and who will continue to suffer great damage in the future by reason of the negligently caused death of the plaintiff's intestate as aforesaid.

Wherefore the plaintiff says that by reason of the premises a cause of action has accrued to her as Administratrix as aforesaid, as by the Statute in such case made and provided, and for the benefit of such next of kin mentioned as aforesaid, who have sustained damage in the sum of $10,000.00, which amount she claims besides costs of this suit.

Second Count. The plaintiff, Ella Anderson, Administratrix of the estate of Charles P. Anderson, deceased, duly appointed such by the Supreme Court of the District of Columbia, holding a special term for Probate Court, and who now here brings her Letters of Administration in that behalf, further sues the defendant, J. Paul Smith, for that on, to wit, June 29, 1906, and at the time of the grievances hereinafter mentioned, the said J. Paul Smith, defendant
3 herein, was engaged in tearing down or wrecking a building on M Street, near 34th Street, Northwest, this City and District and while so engaged had in his employ on said work of tearing down or wrecking said building, one Charles P. Anderson; that it then and there became and was the duty of the said defendant to exercise reasonable care in and about the doing of said work, and to see that reasonably fit and proper machinery, reasonably adequate and sufficient tackle or implements, or a reasonably safe and proper number of men were used in and about the taking down of a large and heavy door-frame from said building, but notwithstanding his said duty in this regard, he became and was negligent in that he failed to furnish reasonably fit and proper machinery, reasonably adequate and sufficient tackle or implements, or a reasonably safe and proper number of men for the removal of said door-frame, whereby and by reason of which said negligence, the said Charles P. Anderson, while in the employ of the said J. Paul Smith, and en-

gaged in and about the tearing down of said building as aforesaid, without fault or negligence on his part, was killed by the premature falling of the said door-frame upon him, and the plaintiff says that said intestate left surviving him as his only next of kin, his widow, Ella Anderson, Administratrix, plaintiff herein; his son, Oliver Anderson, and his daughters Cora Hundley, and Sephronia, Helen and Barbara Anderson, all of whom have suffered great damage, and who will continue to suffer great damage in the future by reason of the negligently caused death of the plaintiff's intestate as aforesaid.

Wherefore the plaintiff says that by reason of the premises
4 a cause of action has accrued to her as Administratrix as aforesaid as by Statute in such case made and provided, and for the benefit of said next of kin mentioned as aforesaid, who have sustained damage in the sum of $10,000.00, which amount she claims, besides the costs of this suit.

LEONARD J. MATHER,
E. N. HOPEWELL,
Att'ys for Pl'ff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and Legal Holidays occurring after the day of service hereof; otherwise judgment.

LEONARD J. MATHER,
E. N. HOPEWELL,
Att'ys for Pl'ff.

DISTRICT OF COLUMBIA, *To wit:*

I, Ella Anderson, Administratrix of the estate of Charles P. Anderson, deceased, on oath depose and say that I am the plaintiff in the Declaration to which this Affidavit is annexed; that as Administratrix of the estate of the said Charles P. Anderson, deceased, I believe I have a good and meritorious action, and am advised by counsel that my cause of action is a good one; that as Administratrix of the said estate I have absolutely no assets of any kind from the es-
5 tate of the said decedent; that said decedent at the time of his death owned no property whatever, either personal or real, and left as his only asset this cause of action herein; that I personally, and the other next of kin have no means whatever wherewith to pay the necessary Court costs for the filing of this Declaration, and pray the Court that I may be allowed to file the same in forma pauperis without advancing the necessary costs.

her
ELLA x ANDERSON.
mark

Subscribed and sworn to before me this 21st day of June, A. D., 1907.

[SEAL.]

JOHN A. SWEENEY,
Notary Public, D. C.

(Endorsed.)

Let this be filed without costs in forma pauperis.

WENDELL P. STAFFORD, *Justice.*

6 *Plea.*

Filed July 18, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49559.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Plaintiff,
vs.
J. PAUL SMITH, Defendant.

The defendant, for plea to the declaration herein exhibited, and each count thereof, says that he is not guilty in manner and form as therein alleged.

MADDOX AND GATLEY,
Attorneys for Defendant.

Joinder of Issue.

Filed July 22, 1907.

In the Supreme Court of the District of Columbia.

Law. No. 49559.

ELLA ANDERSON, Administratrix, etc., Plaintiff,
vs.
J. PAUL SMITH, Defendant.

7 The plaintiff joins issue on defendant's plea heretofore filed in the above entitled cause.

LEONARD J. MATHER,
E. N. HOPEWELL,
Att'ys for Pl'ff.

Memorandum.

October 25, 1909.—Verdict for Defendant.

Supreme Court of the District of Columbia.

SATURDAY, *October* 30, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

At Law. No. 49559.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Pl't'f,
vs.
J. PAUL SMITH, Def't.

The time within which to move for a new trial having expired, judgment on verdict is ordered.

Therefore it is considered that the plaintiff take nothing by her suit, and that the defendant go thereof without day, and recover against the plaintiff, the costs of his defense, to be taxed by the Clerk, and have execution thereof.

8

Order for Appeal and Citation.

Filed November 8, 1909.

In the Supreme Court of the District of Columbia, the 8 Day of November, 1909.

Law. No. 49559.

ELLA ANDERSON, Administratrix,
vs.
J. PAUL SMITH.

The Clerk of said Court will please note an appeal in above case and issue citation.

LEONARD J. MATHER,
E. N. HOPEWELL,
Attorneys for Pl'ff.

9 In the Supreme Court of the District of Columbia.

At Law. No. 49559.

ELLA ANDERSON, Adm'x of Estate of Charles P. Anderson,
vs.
J. PAUL SMITH.

The President of the United States to J. Paul Smith, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause

therein, under and as directed by the Rules of said Court, pursuant to an Appeal from the Supreme Court of the District of Columbia, on the 8th day of November, 1909, wherein Ella Anderson, Administratrix of the Estate of Charles P. Anderson, deceased — Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 8th day of November in the year of our Lord one thousand nine hundred and nine.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By H. BINGHAM,
Ass't Clerk.

Service of the above Citation accepted this 8" day of Nov. 1909.

MADDOX AND GATLEY,
Attorneys for Appellee.

[Endorsed:] No. 49559. Law. Anderson, Adm'x vs. Smith. Citation. Issued Nov. 8, 1909. L. J. Mather, E. N. Hopewell, Attorneys for Appellant.

November 12, 1909.—Appeal bond filed.

December 21, 1909.—Time to file record in Court of Appeals extended to January 14, 1910.

Supreme Court of the District of Columbia.

TUESDAY, *January* 4, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 49559.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Pl't'f,
vs.
J. PAUL SMITH, Def't.

Now comes here the plaintiff by her Attorneys and prays the Court to sign, seal and make part of the record her bill of exceptions taken during the trial of this cause, (heretofore submitted) now for then, which is accordingly done.

11 *Bill of Exceptions.*

Filed January 4, 1910.

In the Supreme Court of the District of Columbia.

Law. No. 49559.

ELLA ANDERSON, Administratrix,
vs.
J. PAUL SMITH.

Be it remembered that this case came on for hearing on the 25th day of October, 1909, before the Honorable Daniel Thew Wright, one of the Justices of the Supreme Court of the District of Columbia, and a jury.

And, thereupon, after the jury had been duly sworn, the plaintiff to maintain the issues on her part joined, testified that she was the widow of the decedent Charles P. Anderson, who had been killed on or about June 29th, 1906, and after making profert of her Letters of Administration, that she was administratrix of his estate, having been duly appointed such by the Probate Court of this District; that at the time of his death her husband was about fifty or fifty-two years of age; that they had been married thirty years; that her husband was working for Mr. John Paul Smith in Georgetown, at a building, at the time of his death; that his other occupation was that of a cook. Most of his work was cooking. He made $7.50 a week on week days and on Sundays would earn $2.50 or $3 cooking. He was always at work and gave me his earnings. I don't remember his having lost six months' work during our entire married
12 life because of sickness. I have five children.

On cross-examination the witness testified that her youngest child was a girl aged nineteen years. Her other children are all over twenty-one. Her husband worked for Mr. Smith for a long time. Doesn't know exactly how long. That was during the summer because he cooked during the winter.

Whereupon, the plaintiff to further maintain the issues on her part joined, gave in evidence the testimony of JOHN PARKER.

My place of business is at 34th and M Streets, I saw the accident when Anderson was killed. I was standing out front and saw the men working to take down this door. The door was about ten or twelve feet high. It wasn't but a few minutes before the door came right down flat. There were two men on the outside prying it up with crow bars about three or four feet long,—medium sized men, weighing from 145 to 150 lbs. apiece. It stood on a stone sill. There were some five or six men inside trying to catch the door and when these men pried it up out of this socket the door went right over like that. It was a double door frame with glass on either side of the door and a heavy skylight over the door in the transom and then a

heavy lintel that runs the whole length of the door and catches onto the brick wall; a four by four scantling, or something or other like that. The door weighed nothing shorter than twelve or fifteen hundred pounds. It was about ten feet wide. The glass was kind of
flowered, leaded glass diamond shape. Each door was about
13 three feet wide. The two men on the outside were prying
the door up with crowbars to lift it out of the socket. After they had pried the door loose nothing happened only the door tumbled right down. It went down on the inside. There were five or six men propped up on the inside trying to hold the door, and of course, it wasn't enough men to catch the door, and when these men pried it up out of this socket, the door went over right like that (indicating), just as quick as that (indicating). I was slightly acquainted with Anderson. He was standing in the center of the door when it fell. No appliances of any sort was used in taking down the door. The foot was not blocked to prevent it from slipping. No rope was used. After Anderson was hurt the whole force that worked on the job was called there to pick the door up. There were more men called there for that purpose than there were there to take the door down. I seen them take the door over there and set it alongside of the brick pile. It took ten men to bring the door down to the brick pile. The men with the crowbars were on the edge of the door sill. There is a socket in the stone sill which goes down into the stone to sort of keep the door from going to the front or back the other way. Of course they had to keep under the edge of the door sill and just prize it out of that socket, and when they prized it out of the socket the door was entirely loose and all it had to do was to go. I heard the order given to go up and take the door down. There was no warning given to Anderson.

On cross-examination the witness testified as follows.

14 I am in the junk business. I was standing about forty or
fifty feet away from the building. I know how the door was fastened because I examined it afterwards. Didn't notice whether the door was toenailed into the sub-flooring. I never measured the door. When I said no warning was given to Anderson I mean to say that I did not hear any warning. Anderson was standing in the center of the door. They were prying the door up to loosen it and let it go and of course it would go towards him and the rest of them too. Some five or six men had hold on each side of the door to let it down. There were colored men on one side of the door and white men on the other side. There were colored men on each side of the door.

Whereupon ZACH HARPER was called as a witness and testified in chief in substance as did the preceding witness. He further testified as follows:

The door frame was removed from the building shortly after the accident and he helped to move it.

(Q.) How many men did it take to move that door? To which question counsel for the defendant objected, which objection was sustained by the Court. To this ruling of the Court counsel for the

plaintiff then and there notes an exception which was duly noted upon the minutes of the Court.

On cross-examination the witness testified as follows:

That the house had been torn down as far as the first floor
15 with the exception of this door frame. The first floor was all clear; there was no rubbish around. I was loading a cart at the time. I have talked with no one about the matter since it happened, only with the lawyer (meaning Mr. Mather). Did not tell Mr. Edward M. Cleary, a member of the bar, shortly after the accident, or at any other time, that "I was loading a cart at the time of the accident and did not see it."

Whereupon WILLIAM ESTRIDGE was called as a witness and testified as follows:

I was working on the building for Mr. Smith at the time Anderson was killed. (Witness then described the character of the door frame in substance as did the witness John Parker.) He testified further that Mr. Dougherty, the foreman, ordered the men to take the door down. He didn't say any particular number of men but just said go up there and take it down. There were seven of us there on the inside of the door. I was standing on the left side of the door and Anderson was standing in the center of it. There were two men on the outside of the door prizing it up from the bottom with crowbars; they were bearing down on the bars; the bars being three or four feet long. When they got it loose it just came right on over. Does not know of Dougherty's giving any warning when he told the men to go up and take the door down. A lot of men helped raise the door off Anderson—more men than were helping lower the door. I remember two of the white men who were helping, Collins and Dougherty. Don't remember the other
16 white man, Joseph Wilson. There were five men on the side where I was. Anderson was in the middle of the door and they were going to pull the door over towards him.

Whereupon RICHARD COLLINS was called as a witness and testified as follows:

That he was working for the defendant on the building at the time of the accident. Dougherty said "men come up here and get hold of this door and take it down." I believe there were eight of us. I was on the inside of the door. There were two men, Italians, heavy set men on the outside prying the door up from the bottom, with crowbars about four feet long. They were jumping their weight on this bar. There were seven men on the inside of the door frame. Anderson was in the middle and I was standing a little over him directly behind him; he got underneath the middle of it. The other men were on each side, and some were right on the side. They arranged themselves in this fashion (indicating arms stretched overhead and legs braced to lower the door as it was pried over). When the men pried the door loose it came on over; we couldn't hold it. There was not anything there—no block or nothing there to take any weight on it, or nothing, and it just dumped right on over, and the men couldn't hold it. I had to fall down and it cut

my shirt and suspenders and all right straight off across my back. Anderson was right in the middle of it and that's what kept the weight off me. It mashed him right down flat. He was
17 standing up straight and it mashed him right on down, and carried him down in that fashion. I was trying to hold the door until everybody let go of it. They all had to let go of it, they couldnt hold it. (Witness then describes the door in size, weight, and character, in substance as had already the witness John Parker, adding, however,) that there was plastering there outside and on top and on each side of the door frame; that the wall had been taken down all around it; that Dougherty, the foreman, didn't give us any warning any more than to take that door down. He didn't use anything at all to help it down, no more than our hands. There was no block put at the foot of the door.

On cross-examination the witness testified as follows:

I remember two white men having hold of the side of the door frame, Dougherty and Collins; don't remember Wilson. Don't know exactly how many colored men had hold of the other side. There were seven altogether. They were placed all around. Anderson stood in the middle of the door. Don't know how long Anderson had been working on the building. He was there when I went there four days before.

Whereupon THOMAS PARKER was called as a witness and testified as follows:

I am a son of John Parker who testified a little while ago. I was standing right where I worked fifty or sixty feet from the building. (Witness then described the size, weight and character of
18 the door in substance as did the witness John Parker.) The witness further testified: I didnt hear any order given to take the door frame down but saw the men go up there to take it down. There were seven or eight men. There were two men each weighing from 150 to 160 pounds prying the door out of the socket with crow-bars, about four feet long. There were no implements around there to take the door down. When the men pried the door out of the socket it came with a sudden force and of course it was too heavy for them to hold it and it just came on down. These men took the point of the bar and put it right underneath where the sockets are and pried it up and then they put their weight right down on it and pried it up. I went closer after the accident. Dougherty and another gentleman pulled Anderson from underneath it. Ten men lifted the door frame off Anderson. Richard Collins came near getting hurt too. The door tore his shirt. It struck him in the back and tore his shirt right down. Whereupon the following questions were asked the witness:

Q. Were you there when that door was taken from the building and removed to the sidewalk? A. Yes sir.

Q. How many men took it there? To which question counsel for the defendant objected, which objection was sustained by the Court. To this ruling of the Court counsel for the plaintiff then and there noted an exception, which exception was duly noted on the Court's minutes.

On cross-examination the witness testified as follows:

19 At the time of the accident my father was standing right by me. I was standing fifty or sixty feet away from the building. From that distance I could tell that the door was fastened on a stone sill with iron bars or something down in the sockets in the sill. These iron bars were about an inch in diameter. I don't know how they were fastened into the stone sill. I don't know whether Joseph Wilson had hold of one side of the door with Mr. Dougherty and Mr. Collins. Three colored men had hold of the other side of the door and three white men had hold of one side of it. Anderson stood in the middle right by the door-knob.

Whereupon ERSKINE M. SUNDERLAND was called as a witness, and, after having been qualified as an architect and engineer, the following question was asked:

Q. We are investigating here as to the fall of a large door frame, and I am going to put a hypothetical question to you. Assume this door frame to be 12 to 15 feet in height and from 10 to 12 feet in width, with a lintel block on the top 4 by 4 extending clear across the width of the door with a leaded glass transom underneath, some 2½ feet in width semi-circular in form, with glass panels on either side of the door extending to within a foot and a half or two feet of the ground. Assume that the leaded glass side lights on either side of the door extend to the same distance from the ground and the door weighs from twelve to fifteen hundred pounds; that seven men were on the inside of that door frame and two men on the outside of the door frame, the two men on the outside weigh-

20 ing between 150 and 165 pounds, and that each of them had a pinch bar four feet in length, which bar was inserted under this door frame and that each man used his weight on the end of that bar to pry loose that door frame from where it was doweled into a stone sill by two bars or dowels about an inch in diameter. Assume further, if you please, that no appliances of any sort were used in taking down that door frame and no blocks were placed at the foot of this door frame to prevent its slipping, and that when it was pried loose it fell down. Would you consider that a safe or unsafe way to attempt to take down that door? To which question counsel for the defendant objected, which objection was sustained by the Court on the ground that the question was not a matter for expert opinion. To this ruling of the Court counsel for the plaintiff took an exception, which exception was duly noted on the minutes of the Court.

Whereupon the witness was asked to compute the acceleration of force acquired by this door in falling from its position under the facts assumed in the former hypothetical question, taking, however, the minimum in weight and dimensions as the basis for calculation. The witness stated as follows: I have not taken that leverage force into consideration at all. I can give you that too.

Q. Would that increase or lessen it? A. It would increase it. You told me to take it at a minimum.

Q. Give us your computation without that extra force or leverage.

—. I have figured it secured at the toe and have its falling
21 weight in pounds for every foot from one up to twelve feet. I can give you its force at one foot, two feet, and so forth, up to 12 feet, and its striking force in pounds; or I can give it to you as if it were a dead weight falling, not secured at the toe where you say it was doweled or toe-nailed.

Secured at the toe its striking force would be 5334 pounds at 12 feet; 3700 pounds at 11 feet; 3400 pounds at 10 feet; 3100 pounds at 9 feet; 2832 pounds at 8 feet; 1770 pounds at 7 feet; 1590 pounds at 6 feet; 1456 pounds at 5 feet; 1450 pounds at 4 feet; 1320 pounds at 3 feet.

On cross-examination the witness testified as follows:

That in his calculation he made no allowance whatever for the resistance which would come from a number of men having hold of the door. That the base of the door carries some of its weight so long as it does not leave the perpendicular and also while it is falling.

Thereupon the plaintiff rested and gave no more testimony to support her case in chief.

And next thereupon, the defendant by his attorneys, moved the Court to direct a verdict for the defendant on the first count of the Declaration, which Motion was granted and an exception noted by the Court upon its minutes.

And next thereupon, the defendant by his attorneys, moved the Court to direct a verdict for the defendant on the second count of the declaration, whereupon, and after argument, the following dis-
cussion between the Court and plaintiff's attorney ensued.
22 The COURT: You are arguing here to me that when a man hires another to do dangerous work he is bound to supply him with paraphernalia and instruments to enable him to do it safely. He is under no such duty at all, and there is no intimation anywhere in the books that he is. Your contention means that no one can employ another to do dangerous work without rendering safe that which is in itself unsafe. The true rule means, as I have said, that if he does furnish paraphernalia, tools and implements, and furnishes defective ones, and the servant is injured by a defect in what he does furnish, it is the negligence of the master in putting the servant to work with something that the servant has a right to believe is not defective, but which turns out to be defective.

Mr. MATHER: Your Honor would distinguish between the master furnishing defective appliances and not furnishing any at all. You would excuse him if he failed to furnish any appliances.

The COURT: There is no duty upon him to furnish any appliances, if he hires a man to work without appliances. How can there be?

Mr. MATHER: I do not take it that he does hire the man to work without appliances.

The COURT: He did not give him any? He says: "Go on and

do this work if you will." Is not that hiring him to do it without appliances?

Mr. MATHER: No; when he hires a man to go and take down a building he guara-teees that man that he will have appli-
23 ances that are reasonably safe for the conduct of that work. Any other rule of law would be disasterous.

The COURT: He is not guilty of negligence. The law is based upon the proposition that you cannot lay traps for other people. When a man supplies a rope or tool or a machine that is defective, he is laying a trap for anybody he puts to work with it, because people have a right to believe that it is what it purports to be; that is, reasonably safe; and he is negligent because he lays a trap; but he does not when he omits to furnish anything.

Mr. MATHER: I am not arguing that, may it please the Court. I am arguing this: That when this man went to work for Mr. Smith he had a right to assume, under the guarantee the law gives him, that Smith would furnish reasonably safe appliances for the doing of that work.

The COURT: You assume that the law gives him that guarantee. That is a new proposition to me. You do not find anything in the law books to that effect.

Mr. MATHER: There is not an authority but what says the duty is upon the Master to furnish reasonably safe and proper appliances.

The COURT: When a man assumes a risk and is hurt by the assumption of that risk, it is his own fault as much as it is the fault of anybody else, and he cannot recover for it. Secondly, there is no theory upon which any negligence of the defendant is shown by the evidence. The only evidence of negligence on the part of anyone is the prying of the door loose, which was done by orders of the foreman. It might have been the negligence of the foreman, but if it was, he was a fellow servant of the plaintiff, and
24 the defendant is not responsible for it.

Take a formal verdict for the defendant.

Mr. MATHER: I take an exception, which exception was then and there duly noted by the Court upon its minutes.

And thereupon, after each and all of the said exceptions were duly taken as aforesaid and entered upon the minutes of the Court, and before the jury had returned its verdict as directed, counsel for plaintiff prayed the Court to sign and seal this Bill of Exceptions which is accordingly done, *nunc pro tunc* this 4th day of January, 1910.

DAN THEW WRIGHT, *Justice*. [SEAL.]

Directions to Clerk for Preparation of Transcript of Record.

Filed January 5, 1910.

In the Supreme Court of the District of Columbia, the 5" Day of Jan., 1910.

At Law. No. 49559.

ANDERSON, Adm'x,
vs.
SMITH.

The Clerk of said Court will prepare the following as a transcript of record on appeal: Declaration filed June 22, 1907, Plea filed July 18, 1907, Joinder of Issue filed July 22, 1907, Memo. of Judgment filed Oct. 30, 1909, Note of Appeal filed Nov. 8, 1909, and
25 Bill of Exceptions filed Jan. 4, 1910, Memo. of Appeal Bond filed Nov. 12, 1909, Memo. of Time to file Record filed Dec. 21, 1909.

E. N. HOPEWELL,
Attorney for Pl't'ff.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 25, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49559 at Law, wherein Ella Anderson, Administratrix of the estate of Charles P. Anderson, Deceased is Plaintiff and J. Paul Smith is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 14th day of January, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2107. Ella Anderson, adm'x, &c., appellant, vs. J. Paul Smith. Court of Appeals, District of Columbia. Filed Jan. 14, 1910. Henry W. Hodges, clerk.

IN THE

Court of Appeals of the District of Columbia

JANUARY TERM, 1910

No. 2107

ELLA ANDERSON, ADMINISTRATRIX OF THE ESTATE OF CHARLES P. ANDERSON, DECEASED, APPELLANT,

vs.

J. PAUL SMITH

BRIEF FOR THE APPELLANT

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Statement of the Case

This is an action on the case brought to recover damages for the wrongfully caused death of appellant's intestate, when in appellee's employ as a laborer. He was killed by a very heavy double door falling upon him, as he, with five or six other co-laborers, obeyed their foreman's order to take this door down.

The declaration, in two counts, charges in the first, that the defendant (appellee) "became and was negligent in that

he failed to provide a reasonably fit, proper and safe place for his employees to work;" and in the second, that he "became and was negligent in that he failed to furnish reasonably fit and proper machinery, reasonably adequate and sufficient tackle or implements, or a reasonably safe and proper number of men for the removal of said door frame."

The proof shows that appellee was wrecking a building on M Street, near 34th Street, Northwest, and that the work was in charge of his foreman, a man named Dougherty; that the building had been taken down to the first floor in its entirety, save for this large double frame door, which had been left standing. (R. 9, 10). This door frame was twelve to fifteen feet in height, and from ten to twelve feet in width with a lintel block on the top, 4" x 4", extending clear across the width of the door, and a leaded glass transom underneath, some two-and-a-half feet in width, and semi-circular in form; that it had glass panels in both doors, with glass side lights on each side, extending to within a foot-and-a-half to two feet of the ground, and also a fringe of plastering around the top and on each side of the door frame as it stood there, while its weight was not less than from twelve to fifteen hundred pounds. (R. 7, 8, 10.) Seven men were ordered to go on the inside of that door to catch and lower it to the ground, as it was pried over in their direction by two men from the outside, each of which weighed from 145 to 150 pounds apiece, and each of which had a pinch bar four feet in length, which he was using by jumping his weight on the end as they pried this door loose from the dowels that held it in position on the stone sill on which it rested (R. 7, 8). No appliances of any sort were used; there were no implements around there of any kind to take the door down; no ropes, no block, nothing there to

take any weight on it; and furthermore, blocks were not even placed against the upright parts of this door to prevent it from slipping after it was pried loose from its supports (R. 8, 9, 10). No warning was given. No *particular* disposition was made of the men. They were on the inside of this door, and arranged themselves along the back of it with their arms stretched overhead against the door, in order to take it down and lower it, as they had been ordered (R. 8, 9, 10). Two men were in the center—Anderson, appellant's intestate, who was crushed to death, and Richard Collins, who had his shirt and suspenders scraped from his back by this falling door. The others were on either side of these men, and escaped injury. The door fell because these men on the inside of the door were unable to hold and lower it, both on account of its weight and top-heavy condition, as well as its acceleration or increase of striking force gained in falling, which amounted to an added weight of 5,334 pounds for the 12 feet covered by its descent (R. 12); for it not only took more men—indeed, the whole force that worked on the job—to lift the door frame off Anderson, than had been ordered up there to hold and lower it, as it was pried over toward them, but it afterwards took ten men to lift that door and carry it down to the brick pile (R. 8).

At the close of the plaintiff's case, a verdict for the defendant was directed; and this appeal is prosecuted to correct the error.

Assignment of Error

That the trial court erred in withdrawing the case from the jury and directing a verdict for the defendant.

Argument

In considering this case, two questions naturally present themselves for review.

First, Whether the risk appellant's intestate ran when obeying the order of his foreman in charge of this wrecking work was one incident to his employment as a laborer for appellee, or was so open and obvious as that the danger therefrom was apparent, and therefore *assumed* by him; and

Second, Whether appellee's foreman, Dougherty, was the fellow servant of appellant's intestate in ordering the door to be taken down as it stood in the *place* provided by appellee, without proper appliances supplied by appellee with which this work of taking down the door might have been performed with reasonable safety to appellant's intestate.

I.

First, then, as to whether appellant's intestate assumed the risk of this large, top-heavy door falling upon him and crushing him to death, as in obedience to the order of his foreman he placed himself on the inside with other of his co-laborers, to hold and take it down as it was pried loose from its supports by the two men on the outside.

An employee may take it for granted that the place which is provided by his master for him to work in is a reasonably safe one. Likewise may he assume that the master has furnished appliances reasonably safe for carrying on the work. Failure in either respect, constitutes negligence, which an employee never assumes, unless so open and obvious as that the danger therefrom is apparent.

These are abstract principles of law, as to which no question can be raised. To apply them to the concrete facts in this case is next in order.

Assumption of risk may be of two kinds.

1st. Risks incident to the service.

2nd. Risks so open and obvious as that the danger therefrom is apparent.

Of the former, whenever naturally to be expected from the nature of the employment, it is assumed by virtue of the contract of service.

Of the latter, resulting, as they do from the negligence of the master, they are never assumed, unless so open and obvious, as that the danger to be apprehended therefrom is glaring and imminent.

Appellee's business was that of wrecking buildings. A dangerous business, but even as was its hazard, so, too, was the commensurate exercise of care made necessary to reasonably guard against such hazard. The facts raised the duty. The one admeasured the other. Each had to be its own equivalent.

Mather v. Rillston, 156 U. S., 391.
Ry. v. O'Brien, 161 U. S., 451.
Patton v. Railway, 179 U. S., 658.

The learned trial court held that appellant's intestate was not entitled to a reasonably safe place to carry on appellee's work (R. 12).

Why not?

Reasons were not advanced, but such a ruling could only have obtained on the theory that the principle could not be invoked where the servants were themselves making the *place,* and where they made unsafe what had originally been supplied to them reasonably safe.

This rather falls under the discussion of the fellow servant doctrine. Suffice it here to say, that the *place* was not being made by appellant's intestate and his co-servants. The

walls were all down. This door alone stood. It was necessary to take it down in due course of time. That time had arrived. Appellee knew all about it. It was his business to know. He wanted it taken down. It was for him to provide a place around about this door that was reasonably safe. If he failed to provide a place that was reasonably safe to carry on appellee's work in the taking down of this door—whether it was unsafe by reason of the size and top-heavy condition of the door, the method of fastening it to the sill, or because no appliances necessary to take it down were supplied—he was negligent. The mere fact that these laborers brought the passive and inherent danger of the place into activity when, in obedience to the order of their foreman, they went up to take this door down, matters not. They did not *create* the danger. It was there from the very inception of the work. It was one of the factors to be taken account of in the removal of this building. It should have been provided for like any other special object of danger arising in the course of the master's work.

It was likewise said by the court below that there was no duty upon appellee to furnish appliances, no matter how necessary they might be in the conduct of his business; and appellant's intestate assumed all such risks when he hired himself out to appellee.

As to the first of these propositions, Mr. Justice Harlan, in Hough v. Railway, 100 U. S., 213, said:

> "To that end (not to expose the servant unnecessarily), the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. * * * It is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business."

Similarly and tersely was it held by Mr. Justice Day, in Kreigh v. Westinghouse & Co., 214 U. S., 249, 255, 256:

> "The employee is not obliged to examine into the employer's methods of transacting his business, and he may assume, in the absence of notice to the contrary, that reasonable care will be used in furnishing appliances necessary to carrying on the business."

As to the second, what risks did appellant's intestate really assume, under his contract of service?

True, he assumed whatever of risk there was incident to this business of wrecking. Only that and nothing more. Was this risk, then, a risk naturally to be anticipated and expected in the course of carrying on appellee's business, or was it not rather a risk which arose because appellee failed to supply and provide what was reasonably necessary to take that door down?

If the former, appellant's intestate assumed it. If the latter, he did not, for an employee never assumes the risk of his master's negligence unless the danger therefrom is so open and glaring as that he must have appreciated it.

It cannot actually be pretended that the risk of taking this door down in the manner in which it was attempted was incident to appellee's business of removing buildings, for inherently dangerous as was this work, 'twas scarcely more so than that of erecting buildings, or dozens of other employments that go on in this hurly-burly of active business life of today.

Bearing it in mind that care commensurate with the duty of removing this door was placed by the law upon appellee, a case of more culpable or grosser negligence is scarcely to be conceived of than was the sending up of those seven men to hold and lower this big top-heavy door, as it was pried

loose from its dowel supports in the stone sill over in their direction. Just think of it! Sending those men to almost certain death or injury, with as little compunction as beasts are sent to the shambles. The only wonder is that more of them were not killed or maimed. Here was a door ten or twelve feet high and about ten feet wide, with this leaded glass transom, heavy lintel block, and fringe of plaster on top, weighing twelve or fifteen hundred pounds in all. Fastened into the stone sill on which it rested with dowels an inch in diameter; with two men on the outside prying it loose by throwing their weight on the upper ends of their four-feet pinch bars, the lower ends having been inserted between the door and the sill, whereby was added to the falling weight of this door the great leverage force thus exerted; with no blocking to prevent the foot of the door from slipping as it was pried loose from its supports; with no appliances of any sort soever, and with the resisting and holding force of these seven men applied about a third of the way up from the bottom to the top of this door, top-heavy as it already was, who! who! could help but say that the elements thus entering into and making up the negligence, show such an utter and reckless disregard of all care for human life and safety, as is tantamount to criminal wrongdoing.

Therefore, as this was not a risk naturally to be expected to arise in the course of appellee's business, it was not a risk incident to the service, and appellant's intestate did not assume it when he entered appellee's employ.

We come now to a consideration of the assumption of the risk by appellant's intestate on account of its being open and obvious.

It may be conceded at the outset that an employer of

labor has the right to carry on his business in any manner he sees fit, no matter howsoever negligent it may be.

It is likewise conceded that an employee may assume the risk of such negligence.

To assume such a risk, however, it is necessary not only that there should be a knowledge of the physical conditions combining to form the danger, but the danger itself must manifest its existence in such an open and glaring manner as that a realizing sense of its imminence is brought home to the mind. In other words, not only must there be knowledge of the elements that go to make up the danger, but as well a conception of their combined probable effect. So that if knowledge of any element combining to form a danger be lacking, there cannot be an appreciation of that risk.

Moreover, appellant's intestate had the right to take it for granted that due care would be exercised in providing the place, and in supplying all necessary tools and appliances with which to carry on appellee's work; and there was neither necessity nor obligation upon him to look out for possible sources of danger, or to hunt for defects in that which it was the duty of appellee to provide reasonably safe for use.

Ry. v. Archibald, 170 U. S., 665, 672.
Ry. v. McDade, 191 U. S., 64, 68.
Ry. v. Swearingen, 196 U. S., 51, 62.
Kreigh v. Westinghouse & Co., 214 U. S., 249, 255, 256.

In this case, then, we have a negro laborer, fifty or fifty-two years of age and a cook by occupation, as well as doing most of that kind of work, although he had also worked a long time for appellee.

With the ordinary mentality and intelligence of the negro laborer, what time or opportunity had appellant's intestate, even had there been present the ability, to appreciate the risk of obeying the order of his foreman?

Then, too, so many elements combining to form this danger were necessarily beyond the reach and apprehension of appellant's intestate, as to make it necessary for a jury to pass upon the question. For instance, what could he have known as to the weight of this door; what as to its top-heavy condition; what as to how it was fastened to the sill, and the leverage force necessary to pry it loose; what as to the added impetus it would get in its descent because of this leverage force exerted at its base; what as to its acceleration of striking force per foot of descent; and what as to the aggregate of holding strength of the six other men who were to assist in taking the door down?

There is no evidence to show that plaintiff's intestate considered the order a dangerous one. He never questioned it. The record does not disclose that he even looked at the door to try and size it up as a source of probable danger, when, in obedience to the command of his superior, he, with his other co-laborers, left the work they were about and went up to take this door down.

In determining the question of obviousness, every reasonable inference must be drawn in favor of the party against whom a peremptory instruction is requested.

Just as in a case of contributory negligence; the question must be one so plain as that the minds of all reasonable men must concur in order to justify a peremptory instruction for the defendant.

Dorsey v. Construction Co., 42 Wis., 583, 598.
Ry. v. Hammett, 13 App., D. C., 370.
Cowen v. Merriam, 17 App. D. C., 186.
Ry. v. Landrigan, 20 App. D. C., 135.

Ry. v. Cooper, 32 App. D. C., 550.
Ry. v. McDade, 135 U. S., 554.
Kane v. Ry., 128 U. S., 91.
Ry. v. McDade, 191 U. S., 64.
Moshuevel v. D. C., 191 U. S., 247.
Kreigh v. Westinghouse & Co., 214 U. S., 249.
Ry. v. Swearingen, 196 U. S., 51, 62.
McCabe & Steen Co. v. Wilson, 209 U. S., 275.

So, too, in cases of the assumption of risk, for, as was said by Mr. Justice Holmes in Schlemmer v. Railway, 205 U. S., 1:

> "Assumption of risk, as extended to dangerous conditions of machinery, premises, and the like, obviously shades into negligence as commonly understood."

How much more, then, is this true when, as in the case at bar, a direct order to take down this door directly preceded the attempted obedience which caused the death of appellant's intestate.

So much so is the extent of the assurance of safety thereby enhanced, as that it practically makes it a question of fact for the jury in nearly all such cases.

Miller v. Ry., 12 Fed. Rep., 600, 602, 603.

The doctrine is well illustrated in the case of Railway v. Ward, 90 Va., at pages 687, 691 and 692. In this case, the plaintiff was ordered by his boss or foreman to dig a groundhog hole, with sides unsupported, and in carrying out that order, the sides of the hole caved in on him.

The court said:

> "When the servant acts under the orders of his master, and is injured * * * it cannot be said

with any degree of reason, that the master and servant stand on equal footing, even though they have equal knowledge of the danger. The servant occupies a position of subordination and may rely upon the skill and knowledge of his master, and is not free to act on his own suspicions.

If, therefore, the master orders the servant into a situation of danger, and he obeys, and is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even, when, like the servant, he was not entirely free to choose."

Again, in Haley v. Chase, 142 Mass., 316, 322 and 323, where a teamster was ordered to drive his team under a gateway, and in so doing was injured, it was held:

"The test is not only what each knew, but what each reasonably ought to have known concerning the risk; and we cannot say that identically the same duty rested on the servant and on the master seasonably to ascertain the extent of the danger involved in performing the work in the manner ordered by the master. * * * The servant's attention must be principally directed to the performance of the work in the manner in which he is ordered to perform it, and he may be in a less favorable position to see and judge of the surrounding dangers; and when he is suddenly called upon to perform a piece of work in a particular manner, under the eye of his employer, he may not reasonably have time for the most careful observation."

This principle has been applied in numerous cases, bringing up the question under a variety of different circumstances. The following are sufficient authority:

U. S. Electric Co. v. Sullivan, 22 App. D. C., 115.
Keegan v. Kavanaugh, 62 Mo., 230, 232, 233.

Brick Co. v. Sobkowiak, 34 Ill. App., 312, 319.
Bartolomeo v. McKnight, 178 Mass., 242, 245, 246.
Stephens v. Ry., 90 Mo., 207, 212.
Moline Plow Co. v. Anderson, 19 Ill. App., 417, 420.
Coan v. City of Marlborough, 164 Mass., 206.
Walker v. Scott, 8 Am. Neg. Rep., 405.
Lynch v. Allyn, 160 Mass., 248.
Patterson v. Ry., 26 Pa. St., 389.
Hennessy v. City of Boston, 161 Mass., 502.
Shortel v. City of St. Joseph, 104 Mo., 114, 120.
Ry. v. Bourman, 212 U. S., 536.

It is plain, therefore, that appellant's intestate could not be held, as a matter of law, to have assumed the risk of appellee's negligence in failing to provide *place* and *appliances* reasonably safe for the taking down of this door.

II.

Has the fellow servant doctrine any proper application to this case?

While the authoratative source of this doctrine as enunciated by Mr. Chief Justice Shaw in the celebrated case of Farwell v. Boston and W. R. Corp., is of but comparatively recent date, as years mark the cycle, yet the question has been such a vexed one, and has produced such a contrariety of legal opinion throughout the courts of the country, both State and Federal, as to render it impossible to examine the question at all fully in this brief.

The principle of law requiring the master to furnish to his employees a reasonably safe place in which to work, and reasonably safe appliances to work with, is axiomatic.

It is well laid down in Railway v. Baugh, 149 U. S., 368, 387, where the engineer and the fireman of a locomotive engine running alone on a railroad were held to be fellow

servants, and this because it was clearly the negligence of the engineer that caused the injury; for there was no failure on the master's part to furnish either place or appliances reasonably safe for use. Mr. Justice Brewer, who delivered the opinion in the case, said:

> "Again a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he has been surrounded, shall be reasonably safe. It is the master who is to provide the place, and the tools and the machinery, and when he employs one to enter into his service, he impliedly says to him that there is no danger in the place, the tools and the machinery than such as is obvious and necessary. Of course some places of work, and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity and cannot be obviated. But within such limits, the master who provides the place, the tools and the machinery, owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precautions shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act, than on the relation of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence

of the master; but if it be not one in the discharge of his positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

While, generally speaking, all those who enter into a common employment bear the relation of fellow servants each to the other, yet among the established exceptions to the general rule as to the non-liability of the common employer to one employee for the negligence of a co-employee in the same service, is one which arises from the obligation of the master not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.

Hough v. Ry., 100 U. S., 213.
Ry. v. McDaniels, 107 U. S., 454, 459.
Gardner v. Ry., 150 U. S., 349, 359.
Mather v. Rillston, 156 U. S., 391.
Hines v. Georgetown Gas. Co., 3 App. D. C., 369, 376.
Staubley v. Power Co., 21 App. D. C., 160, 164-167.

So, here, appellee was removing this building. He knew this large, top-heavy door had to be taken down. He knew or should have known, it was a dangerous object to be removed without appliances. It was his duty to provide those appliances in order that the place where the men had to take down this door might be reasonably safe for that purpose. Just as it is always the master's duty to properly provide against special objects of danger, whether they exist underground or overhead. Appellee didn't. Neither was any warning given. That was his negligence. It wasn't much that was asked of him; not much that the law expected of him; yet it would have saved a human life.

It is not sufficient, either, that the master employed a superintendent or foreman and thus endeavored to relieve himself of all personal responsibility; even though there be no proof to point out the incompetency of such superintendent or foreman.

The duty to furnish a reasonably safe place is an absolute, positive, personal and continuing one, and the risk the servant assumes of the negligence of his fellow servants, does not contemplate the assumption of the master's negligence in failing in its performance.

Fastened by the law upon the master, *his* the duty, for a breach of which he is held strictly accountable. This duty is inalienable and non-assignable, and if there be any negligence, it is immaterial whether such negligence be his own, or that of his servant; as such servant, no matter what his grade or position in the master's service, is the *alter ego* of the master himself.

So held the court in Railway v. Holmes, 202 U. S., 438, 441 (overruling the Dixon case in 194 U. S.), when determining that the negligence of a train dispatcher, causing a collision, was the master's negligence, and not that of a fellow servant.

Ry. v. Herbert, 116 U. S., 642, 647, 648.
Gardner v. Ry., 150 U. S., 349, 359.

In Railway v. Holmes, *supra,* Mr. Justice McKenna said:

> "'There is no ground!'" it is insisted, "'either upon reason or authority for holding that a principal is bound to stand over his servants to enforce proper and sufficient orders once given to them.'"
>
> "There is an instant answer to the contention. Instead of according with principle and authority, it is opposed to both. It contradicts a concession elsewhere made in the argument, that it is the duty of a railroad company to promulgate adequate rules

and regulations for the safety of employees engaged in the dangerous duty of operating trains, and at times telegraph orders for the movements of trains. It is the duty of a master to furnish safe places to work in and safe instruments to work with, and of this there need be no discussion. *The duty is a continuing one and must be exercised whenever circumstances demand it.* * * * But something may occur to one of the trains, with or without fault of anybody, which may endanger the other. May a train dispatcher know it and not guard against it?

A negative answer would be revolting.

A master must furnish a safe place for his servant to work in, and the risk the servant assumes of the negligence of a fellow-servant, does not exempt from that duty."

Mr. Justice Brewer in McCabe & Steen Co. v. Wilson, 209 U. S., 275, 280, held that a fireman on an engine of a construction train was not a fellow-servant of the foreman of a gang constructing a nearby bridge, which fell and caused the accident.

"It is the duty of the employer," said he, "to provide a suitable and safe place for the employees to work, and they are not charged with any responsibility in regard thereto; and while the employer is relieved if he does everything that prudence requires in that respect, it is largely a question of fact." * * * "These latter employees (speaking of the men working on the bridge) represented the principal in an entirely different line of employment from that in which the plaintiff was engaged, were discharging a positive duty of the master to provide a safe and suitable place and structures in and upon which its employees were to do their work—Ry. v. O'Brien, 161 U. S., 451, and cases cited in the opinion—and in discharging that positive duty they

> and not he were the representatives of the defendant. Their action, so far as that work was concerned, was the action of the defendant."

In Kreigh v. Westinghouse & Co., 214 U. S., 249, a foreman bricklayer while at work upon the wall of a building, was knocked from his position and injured by the negligent handling of a swinging bucket attached to a derrick by a boom and guy ropes, and it was held:

> "It is the duty of the master to use reasonable diligence in providing a safe place for his employees to work in and to carry on his business; and the employee may, in the absence of notice to the contrary, assume that the master will use reasonable care in furnishing appliances for carrying on the business.
>
> "The duty of the master to provide safe place and appliances for his employees is a continuing one, and must be exercised whenever circumstances demand it, and this applies where the workmen are engaged in work more or less dangerous, and it is only a matter of using due skill and care to make the place safe. There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer."

A very interesting as well as instructive case is that of Manuel v. The Mayor, etc., of City of Cumberland, which was decided by the Court of Appeals of Maryland, in June, 1909. A sewer trench was being dug under the supervision of the foreman of the city sewer works, who was in turn under the street superintendent and city engineer. Plaintiff was a laborer, engaged with other workmen in digging this trench. The sides, unbraced and unsupported, caved in upon plaintiff, where a gas main (a dangerous object), was located close to the trench. The trial court, holding that the foreman was a fellow servant to plaintiff, and taking the

case from the jury, was reversed on appeal; the appellate court saying that the vital question of the case was one of omission of a positive duty of the master, which could not be delegated so as to avoid liability for neglect.

The theory upon which the court proceeded was that the defendant below, appellee above, knew or could have apprised himself of the location of this gas main, and it was incumbent upon him to so locate the whole course of the trench as that it would not be unsafe by reason of its method of construction, or its proximity to any object which might reasonably be expected to create special danger in the performance of the work.

So in the case at bar; for it matters not whether it be constructive work, or destructive work, that the master is carrying on; whether it be building up or taking down. The duty to be exercised, relatively admeasured, is the same. Here, not only was the method used for taking that door down, an improper and negligent one, but, as well, its very presence there served to mark the existence of a special danger which, unguarded against and unprovided for, was appellee's negligence, personal to himself, which could not be delegated.

In Staubley v. Power Co., 21 App. D. C., 160, 167, a laborer was ordered by his foreman, in conjunction with another man, to draw up a heavy piece of iron cable through a hole in the floor, to a narrow space behind the switchboard, without warning him of the dangers of the place. In attempting to obey this order, plaintiff was injured by coming in contact with a projecting iron lug, heavily charged with electricity.

Mr. Justice Morris, after quoting from the Hough and Mather v. Rillston cases, *supra,* as well as from the case of O'Connor v. Adams, reported in 120 Mass., at p. 427, held:

> "Upon this record as now made it is very evident that there is testimony tending to show that the appellant was sent by his foreman, the agent of the company, into a place of unusual danger without proper warning to him of his danger, and without proper precaution for his protection. Upon this record he was entitled to go to the jury; and we think that it was error, in view of the authorities cited, not to have permitted him to do so."

So in this case the appellant's intestate was ordered by his foreman into a place of unusual danger, without any proper precaution for his protection, and without any warning having been given him.

After a very thorough review of the authorities on the fellow servant doctrine by Mr. Justice Robb, in Carter v. McDermott, 29 App. D. C., 145, where the question was whether the negligence of a conductor to equip his car with a lamp, duly supplied by the street railway company, whereby a collision resulted, and another co-servant was injured, was the continuing personal negligence of the railway company, or the negligence merely of a fellow-servant, the Court said:

> "The duty of equipping its cars with such light is an imperative duty resting upon the company, and one which it cannot delegate so as to escape liability for injuries suffered by a servant by reason of the omission or neglect on the part of the agent or servant entrusted therewith."

Even conceding that foreman Dougherty's negligence concurred with that of appellee's when he ordered these men to take down that door, knowing, as he must have known, that it was almost certain death or injury he was sending them to; yet, appellee is none the less liable for *his* failure to furnish and provide such fit and proper appliances as would have made the place in which to take this door down reasonably safe.

Appellee's negligence commenced, so to speak (when he planned to take that whole building down, for he then knew this door was there; knew that it was an object of special danger; knew that the time would come when it would have to be taken down, and yet never provided a reasonably safe way for its removal. This negligence continued up to the time it caused the death of appellant's intestate.

In Railway v. Cummings, 106 U. S., 700, an engineer sustained injuries by reason of a collision with another train of the same company, and it was held:

> "That the trial court did not err in charging the jury that the company, if its negligence had a share in causing the injuries of the plaintiff, was liable notwithstanding the contributory negligence of his fellow-servant."

Likewise was it said in Deserant v. Railway, 178 U. S., 409, which was an action brought to recover damages for an explosion in a mine:

> "It is undoubtedly the master's duty to furnish safe appliances and safe working places, and if the neglect of this duty concurs with that of the negligence of a fellow-servant, the master has been held to be liable."

Again in Railway Co. v. Lyon, 203 U. S., 465. a brakeman on a freight train lost his life on a spur track, which stopped at a trestle with a buffer at the end, not calculated to resist a car pushed by an engine, but only to stop one pushed by hand, or by the wind. The engineer in charge of the train operated his engine so as to push the cars against the buffer with such violence as to break the buffer away, and precipitate the brakeman down into the canon which was there, and it was held in this case that:

> "Where the negligence of the master in not supplying proper appliances has a share in causing injuries to an employee, the master is liable, notwithstanding the negligence of a fellow-servant, who may have contributed to the accident."

So, too, in Wilmington Mining Company v. Fulton, 205 U. S., 60, 75, the same doctrine was upheld. In this case, the injury was caused by an explosion of mine gas.

Mr. Justice White, who delivered the opinion, said:

> "Where two concurring causes contribute to an accident to an employee, the fact that the master is not responsible for one of them does not absolve him from liability for the other cause, for which he is responsible."

Similarly, in Kreigh v. Westinghouse & Co., *supra,* it was held:

> "That where the negligence of the master in failing to provide and maintain a safe place contributes to the injury of the employee, the master is liable notwithstanding the concurring negligence of those performing the work."

This court in Standard Oil Co. v. Brown, 31 App. D. C., 371, where a similar question was raised on facts that showed a fellow servant of Brown negligently threw a bale of straw from the loft where it was stored through an opening in the floor on top of Brown, whose duties called him underneath this opening, said:

> "Plaintiff was not injured as the result of a single breach of duty on the part of his fellow servant Coleman. For nine years Coleman had been in the

> employ of defendant, and for most of the time had been engaged in the work he was doing at the time plaintiff was injured." * * *
>
> "Defendant, if guilty of permitting a dangerous condition to exist in its barn, cannot relieve itself from responsibility by hiding behind the negligence of Coleman. The negligence of a fellow servant will not relieve the defendant from liability where there is evidence from which the jury could find that the defendant was guilty of negligence and that its negligence contributed to the injury."

Likewise in this case, appellee knowing this door had to be taken down, permitted this dangerous condition to continue, without supplying and providing proper appliances for its removal with reasonable safety to those actually engaged in the work.

As the test must always be whether the negligent act or omission was in discharge of the master's or servant's duty, it is plain to see in this case—the negligent act or omission complained of being the failure to provide proper appliances for the taking down of this door, so that the place thereabouts would have been made reasonably safe—that it was appellee's fault, *his* negligence, rather than that of his foreman Dougherty. Dougherty merely called into activity the inherent danger that had existed with appellee's knowledge sufficiently long to have enabled him to properly provide and guard against it.

While, of course, the master is never liable when furnishing originally fit and proper place and appliances for use, they afterwards become unfit, through the transitory and momentary negligence of the servant. Then there is no personal wrong done by the master; nothing left undone by him that he should have done in the exercise of ordinary prudence and care. It is the negligence of the instant, marking, as it does, the independent and improper act of the serv-

ant, rather than anything the master could properly have guarded against.

Such is not this case.

Ample the time and opportunity for appellee to have provided proper and fit appliances for the taking down of this door.

It was his duty to provide the place, and when he furnished it, and it was put to its intended use, and killed appellant's intestate because he had not provided these appliances; therein was appellee at fault; therein was he negligent.

Apropos, and in conclusion of a discussion which has unduly lengthened itself out, reference is again made to the latest utterance of the Supreme Court of the United States in the Kreigh v. Westinghouse & Co. case, *supra*. Here a foreman bricklayer was knocked from where he was at work on a wall by the improper handling of a swinging bucket attached to a derrick. Clearly the act and negligence of a fellow-servant, if the derrick and its adjuncts had been furnished reasonably safe. But it had not been, for there was evidence tending to show that "the proper construction and management of such a derrick required that its boom should be rigged with two guy ropes instead of one, or that the mast should be provided with a lever by means of which the men in control could safely operate the boom."

Said the court:

> * * * "In view of the testimony referred to we think it was a question for the jury to determine whether the character of the derrick furnished by the master discharged his obligation to furnish and maintain for the plaintiff and his associates a reasonably safe place in which to labor."

Furthermore, it was held:

> "Where workmen are engaged in a business, more or less dangerous, it is the duty of the master to exercise reasonable care for the safety of all his employees, and not to expose them to the danger of being hurt or injured by the use of a dangerous appliance or unsafe place to work, where it is only a matter of using due skill and care to make the place and appliances safe. There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer, and the duty of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character."

From the above review of the facts and law in the case at bar, it is clear there was no assumption of risk by appellant, as a matter of law; neither is the fellow-servant doctrine properly applicable to it as a matter of law.

It is accordingly urged that the judgment of the lower court should be reversed, and this case remanded for a new trial.

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Court of Appeals, District of Columbia.

JANUARY TERM, 1910.

No. 2107.

ELLA ANDERSON, ADMINISTRATRIX OF THE ESTATE OF CHARLES P. ANDERSON, DECEASED, APPELLANT,

vs.

J. PAUL SMITH.

BRIEF ON BEHALF OF APPELLEE.

SAMUEL MADDOX,
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Statement of the Case.

This is an appeal from a judgment predicated of a ruling of the trial court directing a verdict in favor of appellee, in a suit brought by appellant to recover damages for the death of one Charles P. Anderson, caused by the alleged negligence of appellee.

On the 29th day of June, 1906, the appellee was engaged in tearing down an old building in Georgetown. Appellant was one of the men employed in doing the work.

The building had been torn down as far as the first floor, and the floor was all clear of obstructions and rubbish (R., p. 9). There remained standing, however, a door frame, and it was while this door frame was being taken down that

it fell upon Anderson and killed him. A man named Dougherty was foreman of the work. The only order that he gave with respect to taking down the door frame was, "men, come up here and get hold of this door and take it down." He didn't say any particular number of men, but just said, "go up there and take it down" (R., p. 9).

There were seven or eight men engaged in the work, some on either side of the door frame, and two other men pried the door out of the sockets in which it rested. *Anderson was in the middle of the door, and they were going to pull the door over towards him* (R., p. 9).

When the two men pried the door loose the other men let go, and it fell over, striking Anderson, and death resulted from the injuries he received.

Anderson had worked for the appellant a long time (R., p. 7), and the record shows he had been at work on this building at least four days before the accident happened (R., p. 10).

There is not a word of evidence in the record to show that Anderson assumed the dangerous position that he did by reason of any directions given him. It was his own voluntary act. Nor is there the slightest evidence to show that the work was not being done in the usual and customary way that such work is done.

ARGUMENT.

The ruling of the trial court in directing a verdict in favor of the defendant was correct.

First. There was no evidence to show that the work was not being done in the usual and customary way.

The negligence charged in the first count of the declaration is that appellee "was negligent in that he failed to provide a reasonably fit, proper and safe place for his employees

to work," and in the second count that "he was negligent in that he failed to furnish reasonably fit and proper machinery, reasonably adequate and sufficient tackle or implements, or a reasonably safe and proper number of men for the removal of said door frame." These are the only claims of negligence made, and there was no evidence offered in support of either of them.

The testimony showed that the house had been torn down as far as the first floor, and that the floor was clear of all obstructions and rubbish; so that as far as the place itself was concerned it was "a reasonably fit, proper and safe place" for the men to work.

Armour *vs.* Hahn, 111 U. S., 313, 318.

In fact it was the only place where the work could be done.

There was no evidence offered to show that machinery, tackle, or implements are generally used in taking down a door frame such as is described in the record or that the work was not being done in the usual and customary way. In the absence of such evidence there could be no inference of negligence.

The master is only bound to use such appliances and devices as are commonly used by others engaged in the same business.

Ball *vs.* United States Express Co., 32 App. D. C., 177-182.

This court in Asphalt Company *vs.* Mackey, 15 App. D. C., 410, clearly states the rule:

> "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average

> prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community."

And where appliances and instrumentalities are furnished, to hold the master responsible, a servant must show that the appliances and instrumentalities so furnished were defective. A defect cannot be inferred from the mere fact of injury, but there must be some substantive proof of the negligence.

Schneider *vs.* American Bridge Company, 31 App. D. C., 420, 427.

Asphalt Company *vs.* Mackey, *supra.*

Second. The risk incident to the work being done by Anderson was assumed by him when he accepted the employment.

> "It is an elemental principle that an employee, when he enters into service, agrees to assume all risks ordinarily incident to his employment; and, if he is of mature years, experienced in the business undertaken, and knows what instrumentalities are to be used by him, he contracts that he will assume the risks incident to using that class of instrumentality, as well as any other risk incident to the business; and, if the master uses proper care in providing the kind contemplated, the employee cannot complain, although some other kind might have been less dangerous; his contract hushes his complaint, regardless of the employer's negligence."

Railway Company *vs.* Davis, 54 Ark., 394;

See also—

Sullivan *vs.* India Mnfg. Co., 113 Mass., 398.

A servant

> "assumes not only all the risks incident to such employment but all dangers which are obvious and apparent * * * If he voluntarily enters in, or continues in, the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk, and to waive any claim for damages against the master in case of personal injury to him."
>
> Crown *vs.* Orr, 140 N. Y., 450.

The burden is on the plaintiff to establish negligence of the master and his own care. The presumption is that the master discharged his duty, and this presumption must be fairly overcome by proof of his personal fault or negligence.

McMillan *vs.* Saratoga, &c., Co., 20 Barb., 449.

> "The master is not responsible for an accident happening in the course of his service unless the master knew that it exposed the servant to peculiar danger and the servant did not."
>
> *Id.*, 454.

> "If a servant with knowledge of the circumstances under which the employer carries on his business, choses to accept the employment, or continue in it, he assumes such risks incident to the discharge of his duties as are open and obvious. In such cases it is not a question whether the place prepared for him to occupy, and which he consents to accept, might, with reasonable care, have been made more safe. His assent dispenses with the performance on the part of the master of the duty to make it so."
>
> Wood *vs.* Heiges, 83 Md., 257.

> "Obvious imperfections in methods or machinery, existing at the time of the employment, cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has the right to have and use imperfect methods and tools and to ask others to enter his employ to aid him in such use

and that in so doing he does not undertake to insure the employee."

Ragon *vs.* Toledo, &c., Co., 97 Mich., 265.

See also—

Carrigan *vs.* Washburn, &c., Co., 170 Mass., 279.

It is not the duty of a master to warn his servant of apparent dangers. He should look for himself and see that which requires no special skill or knowledge to detect.

"The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to every one. Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

Kohn *vs.* McNulta, 147 U. S., 238.

A servant

"cannot be said not to consent to the thing which he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself and where therefore the application of the maxim *'Volenti non fit injuria'* is completely justified."

Lord Halisbury in Smith *vs.* Baker, 60 L. J. Q. B. N. S., 683.

Third. The death of Anderson was due entirely to his voluntary act in placing himself in a position of danger.

Let us briefly at this point consider the evidence as shown by the record. This house had been torn down as far as the first floor, which was perfectly clear of obstructions. The only remaining thing left standing was this door frame. There was nothing hidden about it, no concealed danger, but, on the contrary, it was clearly visible to every one.

The men employed were told to take it down. Nine of

them undertook the work, several of them placing themselves on each side, two, with short crowbars, undertaking to pry the door out of the sockets in which it rested, while Anderson placed himself "in the middle of the door, and they were going to pull the door over towards him" (R., p. 9). There is no evidence to show he was told to take the position he did and, in the absence of such evidence, it must be assumed he acted voluntarily and of his own motion. He must necessarily have known that his position was a dangerous one, and that if, for any reason, the door fell he would be injured. Having thus voluntarily placed himself in this dangerous position, and the injuries received being consequent upon that act, no right of recovery exists.

> "It is undoubtedly the law that an employé is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them, if in his power to do so. He will be deemed, in such case, to have assumed the risks involved in such heedless exposure of himself to danger."
>
> Kane *vs.* Northern Central Ry., 128 U. S., 91-94.

That no right of recovery exists in this case has, we submit, been conclusively determined by this court.

In

Sardo *vs.* Moreland, 17 App. D. C., 219,

it appeared that appellees were dealers in game in the Center Market in this city, and appellant was in their employ. There was a slaughtered deer lying on the floor of the aisle near the game stalls, which was in the way. Moreland, one of the appellees, stated that he would have it removed. Later one of the appellees suggested to get a rope and hoist the deer to the ceiling above the stalls. One Carter got the rope, which

subsequently proved to be old and frayed. The rope was run through the holes in the iron lattice work at the top of one of the pillars near the top of the market house. It seems there was an iron hook attached to the pillar, which had been used on former occasions for hoisting deer by means of a rope thrown around it. Whether the hook was in place at the time did not appear. While Carter and a man named Lipscomb were endeavoring to hoist the deer, one Reed and appellant Sardo went to their assistance. The suggestion or direction to do so came to Sardo from Reed, whose orders Sardo, at the time of his employment was told to obey. The words of the former to the latter were: "Come on, Joe, and help raise the deer at the game stand."

The rope caught in the lattice work, and after tugging at it in vain for a time, Reed got on a barrel and Sardo followed him; and they again tugged at the rope, while Lipscomb and Carter sought to boost the deer with their shoulders from beneath. They were able to hoist the deer only about three or four feet. Then Sardo said to Reed that he was going to swing off the barrel and throw his entire weight upon the rope, which he did. In a moment the rope broke, and Sardo was precipitated to the floor and injured.

The court, at page 226, says:

> "But even if we assume that there was actual negligence on the part of Moreland, and that he had expressly authorized and directed the use of a rotten rope on this occasion, and that he had expressly authorized and directed it to be run through the interstices of the lattice work, it is still very plain that the accident which occurred to the appellant was the direct result of his own thoughtless and improvident, although well-meant, action. No one directed the appellant to get on the barrel, in order the better to pull the rope; no one directed him to swing off from the barrel at the end of the rope and thereby to add the weight of his body to the force which was exerted in order to raise the deer. That was undoubtedly a dangerous proceeding, which he would not have been

justified in pursuing even at the direct and positive command of Moreland (Railroad Company *vs.* Jones, 95 U. S., 439). But, so far as the record shows, there was no suggestion from any one that he should do this thing. It was his own voluntary act to do it. Had he remained upon the floor, or even upon the barrel, tugging at the rope, even though the rope had been broken in the effort, it is very clear that the accident would not have occurred, or at all events would not have occurred in the manner and to the extent to which it did occur. To the appellant's own action, therefore, must be attributed the injury which he received and not to any negligence on the part of the employers.

"We think there was nothing in this cause to be submitted to a jury; and we are of the opinion that the trial court was entirely right in directing a verdict for the appellees."

In

Hayzel *vs.* Railway Company, 19 App. D. C., 359,

it appeared that appellant was employed as a conductor by appellee. On the evening when the accident occurred appellant, as conductor, was in charge of a car with one Brown as motorman. When the car reached Ninth street and New York avenue, as it was making a trip westward, the lights on the car became extinguished, and it was found impossible to light them again, and the remainder of the trip was accomplished without lights. The motorman refused to make the return trip without a headlight, and so, when the next car came up to the station in the street at the west end of New York avenue, the appellant sought to have his car, No. 10, connected with it, and so to be taken back to the barn at the other end of the line. Two futile attempts were made to effect the connection. The appellant then noticed that the drawheads of the two cars were not on a level, and supposing this to be the cause of their failure to connect, went between the two cars, and, holding the two drawheads on a level, directed the motorman of the second car to bring that

car nearer so that the drawheads might connect. But there was again failure. The drawhead of the second car shot out towards the plaintiff, and his arm was caught between the bumpers, and rather severely injured.

At the trial there was offered in evidence a rule of the company providing:

> "When a car is blocked on the road from any cause whatever, it is the imperative duty of the conductor to leave his car instantly, and by every means in his power to help get the cars in motion with as little delay as possible; and as soon as the obstruction is removed, to get on his car at once; the gripman must remain in charge of the cars at all times."

In affirming the ruling of the trial court directing a verdict for the company, this court says, pages 371, 373:

> "The rule of the company, which required the conductor of a car to use 'every means in his power to help to get the car in motion' when it had been blocked, did not require him to put himself in a position of danger for that purpose. If it were to be construed that such was the requirement, it would also have to be held that by assuming the employment that plaintiff also undertook the risk. Whether he was warned of his danger in attempting to go between the cars, which was testified to by the two motormen and the conductor of the other car, and which was denied by himself, thereby raising a question of fact, which, if it stood alone, might properly been left to the jury to determine, is of no consequence, since, under the ordinary rules of conduct that govern reasonably prudent men, and by the action of the two cars in the first attempt to couple them, he must have known that there was danger in going between them in the manner in which the plaintiff did, and for the purpose for which he went."

* * * * * * *

> "We fail to find in the record any evidence of negligence on the part of the defendant company. The act of the plaintiff, although well meant and in-

> spired by a zeal to do his duty, was not the dictate of due caution on his part; and to his want of care and prudence the unfortunate accident must be attributed. In our opinion there was nothing in the case to be submitted to a jury; and we think that the trial court, which was of the same opinion, was correct in so ruling and in directing a verdict for the defendant."

Fourth. The negligence, if any was established, was the negligence of the fellow-servants of appellant.

Under the evidence offered there can be no doubt as to the cause of the falling of the door.

Two men undertook with crowbars to pry the door from the sockets in which it rested. As soon as it was pried loose the men having hold of the door let go of it and it fell. These are the simple facts. All of the men engaged in the work of taking down this door were engaged in a common employment.

It is not necessary to do more than state the rule of law with respect to the fellow-servant doctrine.

The Supreme Court, in Northern Pacific R. R. Co. *vs.* Herbert, 116 U. S., 642, 647, states it:

> "The general doctrine as to the exemption of an employer from liability for injuries to a servant, caused by the negligence of a fellow-servant in a common employment, is well settled.
>
> "When several persons are thus employed, there is necessarily incident to the service of each the risk that the others may fail in that care and vigilance which are essential to his safety. In undertaking the service he assumes that risk, and, if he should suffer, he cannot recover from his employer. He is supposed to have taken it into consideration when he arranged for his compensation. As we said on a former occasion: 'He cannot in reason complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid.' Chicago & Milwaukee Railroad Co. *vs.* Ross, 112 U. S., 377, 383."

There can be no difficulty in applying this rule to the facts in this case.

We respectfully submit that there is no error in the judgment appealed from, and it should therefore be affirmed.

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